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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. ~~1230~~ 192

WILLIAM SESSOMS,
Petitioner,

v.

THE UNION SAVINGS AND TRUST COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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May 26, 1965.

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In the Supreme Court of the United States

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THE UNION SAVINGS AND TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Your petitioner, William Sessoms, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on November 27, 1964 in Case No. 15619 on the docket of that Court.

OPINIONS BELOW.

The opinions below that generate the question that now comes to the Court may be found as follows:

1. Opinion of the United States Court of Appeals for the Sixth Circuit reversing the jury verdict for petitioner (plaintiff below) and remanding for retrial. It was written by District Judge Taylor, sitting by designation, with the concurrence of Judge Cecil and Judge Phillips, and appears in the Appendix hereto, at page 15. It is reported at 338 F. 2d 752.

2. Per Curiam opinion of the United States Court of Appeals for the Sixth Circuit denying petition for rehearing appears in the Appendix at page 28. It is reported at 342 F. 2d 751.

JURISDICTION.

The judgment in question was entered by the Court of Appeals November 27, 1964. (Appendix, p. 28.) Timely petition for rehearing was denied February 27, 1965. (Appendix, p. 31.)

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1), within the 90 days fixed by 28 U. S. C. Section 2101(c).

QUESTION PRESENTED.

Petitioner sued and got judgment for malicious prosecution of a criminal charge.

The Trial Court erroneously but without objection instructed the jury that plaintiff's guilt or innocence was not an issue in the case, and erroneously refused a requested instruction that the jury should find for the defendant if it found plaintiff guilty of the crime for which he claims he was maliciously prosecuted.

Nevertheless the Trial Court submitted to the jury on request of defendant (respondent) a written interrogatory asking in effect whether plaintiff was guilty of the crime; the jury answered that he was not.

On appeal the Sixth Circuit held the error confusing, not harmless, in spite of the answer to the written interrogatory.

Does the answer to the written interrogatory make the error harmless?

Petitioner answers YES, respondent NO.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

Rule 49(b) of the Federal Rules of Civil Procedure provides as follows:

> "GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES.
>
> The court may submit to the jury, together with appropriate forms for a general verdict, *written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.* The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and *the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58.* When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and a verdict or shall order a new trial." (Italics added.)

Rule 51 of the Federal Rules of Civil Procedure provides as follows:

> **"Instructions to Jury: Objection.**
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court

instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury." (Italics added.)

STATEMENT OF CASE.

A. The Facts on Which Case Turns.

Petitioner, William Sessoms, had his payroll check cashed at a Warren, Ohio department store. Respondent bank entertained a belief that one of its tellers had cashed the paycheck for petitioner prior to petitioner's having cashed it at the department store and that petitioner had wrongfully stolen it back from respondent.

Respondent initiated a criminal prosecution against petitioner for grand larceny. A jury verdict of not guilty was returned.

Petitioner filed this action against respondent for malicious prosecution. Jurisdiction of the District Court was invoked on the ground of diversity of citizenship.

At the conclusion of the evidence respondent requested the District Court to instruct the jury that it should determine whether or not petitioner was guilty of the charge for which he had been prosecuted, that is, the charge that he stole the check after cashing it at the bank, and that if the jury found petitioner was guilty, its finding should be for respondent. The Court refused to give the requested instruction on the issue of petitioner's guilt or innocence.

The District Court instructed the jury that the question of petitioner's guilt or innocence was not an issue in the case. That instruction was contrary to the law of Ohio, but no objection was taken to it by respondent.

Submitted to the jury was a special interrogatory. It asked whether petitioner had cashed the payroll check twice, once at respondent bank and a second time at the department store. The jury answered "No."

The jury returned a general verdict for $30,000. A remittitur was ordered by the District Judge to $20,000.

The Court of Appeals reversed and remanded for retrial.

B. Changed Basis of Circuit Court's Reversal.

In its original opinion the Court of Appeals reasoned that the language of the fact interrogatory did not constitute an "explicit" reference to the issue of petitioner's guilt or innocence. (Appendix, p. 27.)

The Court of Appeals did not look beyond the interrogatory to the jury's answer. Disregarding the jury's answer finding petitioner innocent, the Court held that respondent had been prejudiced by the erroneous instruction excluding guilt or innocence as an issue in the case.

On petition for rehearing the Court of Appeals reversed its position on the interrogatory. The Court agreed that the effect of the interrogatory was to pose a pure fact question on the issue of petitioner's guilt or innocence. The Court conceded the interrogatory *had*:

> *"required the jury to pass on the guilt or innocence of plaintiff."* (Appendix, p. 30. Italics ours.)

But the Court below again disregarded the jury's finding of petitioner's innocence.

The asking of the interrogatory, although in full compliance with the requirements of Rule 49(b), was termed "inconsistent" with the District Court's charge on the issue of petitioner's guilt or innocence. (Appendix, p. 30.) The Court of Appeals now assumed and held that this "inconsistency" between the oral instruction and the submission of the interrogatory had confused and misled the jury—*which answered it upon the District Court's direction*—to respondent's prejudice. (Appendix, p. 30.)

REASONS FOR GRANT OF WRIT.

This case presents a problem this Court should review, because:

I. RULING BELOW UNDERMINES THE JURY'S FACT-FINDING FUNCTION BY DESTROYING THE VITALITY OF RULE 49(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The provision of Rule 49(b) that written interrogatories shall test

> "one or more issues of fact the decision of which is necessary to a verdict,"

has been given, until now, full force and effect. It has, until now, had a clear meaning. The method of Rule 49(b) compels a jury to pay special attention to the specific point involved in the interrogatory. 5 *Moore's Federal Practice*, 2nd ed., 2209, par. 49.04.

But, under the decision of the Court below, the jury's special finding in response to a pure fact interrogatory is given no credence.

The Controlling Force to Which a Jury's Answer to a Fact Interrogatory Is Entitled.

A jury's answer to a fact interrogatory is entitled to controlling force under the Federal Rules of Civil Procedure. *Wilson v. Holsted Valve Mfg. Co.* (3rd Cir. 1954), 217 F. 2d 792. Answers to interrogatories were there held (p. 800) to render retrial unnecessary. The principle and that holding apply here.

The jury returned a general verdict for petitioner. It also answered "No" to the special interrogatory which asked if petitioner had cashed the paycheck at respondent bank and then cashed it a second time at the department store. The general verdict and the jury's answer to the interrogatory were harmonious.

The disputed fact in issue tendered by the interrogatory was whether petitioner had cashed his paycheck at respondent bank. This cashing or non-cashing at the *bank* was the sole issue of fact at stake in the question whether petitioner was guilty or innocent of the offense charged by respondent.

It was agreed on both sides that petitioner had cashed the paycheck at the department store. The jury's finding that petitioner did not cash the check twice necessarily was a finding that petitioner had not previously cashed it at the bank.

Since petitioner did not cash the check at the bank he could not have been guilty of stealing it from the bank, for when he left there the check was still his own property. The jury's answer to the special interrogatory affirmatively established as a fact that petitioner was not guilty of theft of bank property as charged.

The jury's specific finding that plaintiff had not had the paycheck cashed at the bank was entitled to respect by

the Court of Appeals. That finding was a "guarantee of their [the jury's] intentions." 5 *Moore's Federal Practice* 2211, par. 49.04, footnote 7. To disregard that finding, or to hold it meaningless as does the Court of Appeals, is to render the jury's fact-finding process an exercise in futility.

Had the jury's answer to the question put by the interrogatory been in the affirmative—which of course was the hope of respondent when it prepared and submitted the interrogatory after its requested instruction had been refused—respondent would have been in the comfortable position of moving for judgment as a matter of law because of the explicit decision on the issue made by the jury's answer.

There is no warrant for the Court of Appeals to assume that the jury was confused. The special interrogatory was clear. *It asked for a finding of fact that tested an issue—the issue of original guilt—the decision of which was necessary to the verdict.* There is no indication whatsoever that the jury's answer to the interrogatory would not have been the same had the District Court given the requested instruction and not given the erroneous instruction.

Respondent asked the question to test the verdict. In answering the question the jury proved the verdict. The answer proved that the jury found petitioner not guilty of the original charge. The jury proved by its answer that the District Court's error was harmless.

II. THE DECISION OF THE COURT OF APPEALS REPUDIATES THE COGENT STATEMENTS IN KANAWHA AND MICHIGAN RAILWAY CO. v. KERSE, ADM. (1915), 239 U. S. 576, OF THE "HYPOTHESIS" RULE OF HARMLESS ERROR.

It is settled policy in the federal court system that a plaintiff's judgment is not to be reversed for an error by which the defendant cannot have been prejudiced. *Kanawha and Michigan Railway Co. v. Kerse, Adm.*, 239 U. S. 576. This policy is enforced where, as under the circumstances here present, proceedings under Rule 49(b) have rendered the District Court's error harmless. The Court of Appeals disregarded the rule laid down by this Court in the *Kanawha* case.

The *Kanawha* case involved an FELA suit for the death of a brakeman knocked off of a box car by a timber erected over the track. The trial court erroneously refused to charge on assumption of risk, the request being founded on the hypothesis that decedent knew of the presence of the timber. This Court said:

> "* * * *The refusal of this request appears plainly erroneous. But this does not result in a reversal of the judgment under review, because by specific findings of fact the jury negatived the hypothesis upon which alone the instruction was based.* In response to particular interrogatories submitted by the court, they found that Barry did not know that the piece of timber was stretched over the track, and (of course) did not know that the timber was so low that it would not clear him standing upon the top of the box car.
>
> *"A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced. And the refusal of an instruction* as to the legal results that follow only upon the hypothesis that the deceased knew of the presence of the timber, and

> knew it would not clear a man standing upon the top of the box car, *became legally insignificant when the jury had in its findings distinctly negatived the facts that made up the hypothesis. Thus the progress of the trial rendered the error wholly immaterial to the merit.* Greenleef v. Berth, 5 Pet. 132, 135, 8 L. ed. 72, 73; Fidelity & D. Co. v. Courtney, 186 U. S. 342, 351, 46 LA 1193, 1198, 22 Supp. Court. Rep. 833.
>
> "Judgment affirmed." (239 U. S. at 581, 582. Italics ours.)

This postulate of harmless error is controlling doctrine. It makes sense. It has been adhered to in *Clark v. Erie Ry. Co.* (D. N. D. N. Y., 1916), 230 Fed. 478, 485; *NLRB v. Air Associates* (2nd Cir. 1941), 121 F. 2d 586; and *Blake v. Trainer* (D. C. Cir. 1945), 148 F. 2d 12.

The rule of *Kanawha* applies with equal force to the giving of an erroneous instruction as to the refusal to give a correct instruction. *Bass, Admrx. v. Dehner, Extrx.* (10th Cir. 1939), 103 F. 2d 28, *cert. denied,* 308 U. S. 580; *Pacific Greyhound Lines v. Zane* (9th Cir. 1947), 160 F. 2d 731. There is no prejudice from an erroneous instruction which a special finding shows has caused no injury.

Even if it were attempted to distinguish *Kanawha* on the ground that it dealt with an omission to instruct, whereas our present case involves an erroneous instruction given, the Court of Appeals is barred from review by Rule 51 of the Federal Rules of Civil Procedure because the instruction *given* was not objected to. Rule 51 states, in part:

> "* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

Petitioner on his petition for rehearing argued the doctrine of harmless error and cited the rule laid down by this Court in the *Kanawha* case on the effect of answers to special interrogatories. Although it recognized the soundness of the doctrine (Appendix, p. 31), the Court of Appeals ignored *Kanawha* and rested its holding on the doctrine that inconsistent or contradictory *instructions* of law confuse a jury. On this subject the Court quoted *Standard Life and Accident Insurance Co. v. Sale* (6th Cir. 1903), 121 Fed. 664 at 669:

> *"The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and, secondly, it is impossible after verdict to ascertain which instruction the jury followed."* (Emphasis by Court of Appeals. Appendix, p. 31.)

But conflicting instructions of law were not given by the District Court. Here we are dealing with an instruction on law and an omission to instruct. They were contradicted by the submission of a *written interrogatory*. This is an altogether different situation from inconsistent or contradictory instructions.

It was not impossible for the jury here to know whether the instruction of law or the interrogatory was to be its guide. The jury, instead of disregarding the issue of petitioner's guilt, as the erroneous instruction directed, did in fact consider that issue in determining its "No" answer to the written interrogatory.

And here, instead of the Court of Appeals' suggestion that it is impossible after verdict to ascertain which instruction the jury followed, it is not only possible to determine but it is compellingly demonstrated that the jury followed the instruction to answer the written interrogatory: the jury did answer it.

In the words quoted by the Sixth Circuit from *Standard Life and Accident Insurance Co.*, 121 Fed. 664, it does here "* * * appear clearly that the party complaining of [the erroneous instruction] was not prejudiced."

III. THE COURT OF APPEALS' DECISION CREATES CONFLICT BETWEEN THE CIRCUIT COURTS.

The Sixth Circuit's assumption that an "inconsistency" arose out of submission of the interrogatory (Appendix, p. 30) conflicts with the Ninth Circuit's position, in the tradition of *Kanawha*, on the effect of answers to interrogatories on inconsistent or conflicting instructions of law. *Pacific Greyhound Lines v. Zane* (9th Cir. 1947), 160 F. 2d 731.

Referring to coupling of a general verdict with answers to fact interrogatories on a disputed issue, the Ninth Circuit found such practice permits a court "*to know to a certainty*" that the giving of conflicting or inconsistent instructions is harmless error. *Pacific Greyhound Lines v. Zane*, 160 F. 2d at 737 (Italics ours).

Thus even if there were present here contradictory instructions, which there are not, the doctrine of the *Standard Life and Accident* case would not apply because of the clarification provided by the jury's answer to the special interrogatory.

To lawyers it may be plain that the Trial Court acted inconsistently when on the one hand it gave an erroneous instruction and refused a correct one, and, on the other hand, submitted the written interrogatory that tested whether petitioner had been guilty of the crime. But if the jury even noticed the inconsistency, and there is no indication that it did, the jury nevertheless followed the District Court's instruction to answer the interrogatory.

The jury thus necessarily considered the question of petitioner's guilt in spite of having been instructed generally that it should not concern itself with this question. The jury found petitioner had not been guilty. There is no warrant to vitiate this finding by any assumption that the jury was confused or misled, or to hold that respondent was in any way prejudiced.

CONCLUSION.

The jury's general verdict was clear. The special interrogatory and the jury's answer to it were clear. The general verdict and the answer to the interrogatory, read together, were harmonious. The Court of Appeals acted incorrectly when it disregarded the jury's harmonious verdict and answer.

The jury's answer to the third interrogatory proved that respondent would not have benefited if the Trial Judge had charged the jury to consider the question of petitioner's guilt. It proved that respondent was not harmed by the Trial Judge's error. A jury verdict should not be reversed for harmless error.

The Court of Appeals should not be allowed to disregard the mandatory prescription of Federal Rule 49(b). The Court of Appeals should not be allowed to disregard the rule this Court laid down in the *Kanawha* case, 239 U. S. 576. The Court of Appeals should not be allowed to undermine the jury's function and to reject the jury's finding where prejudicial error has not occurred.

This petition for writ of certiorari should be granted.

Respectfully submitted,

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May 26, 1965.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided November 27, 1964.)

Before: CECIL and PHILLIPS, Circuit Judges, and TAYLOR, District Judge.

TAYLOR, District Judge. This is an appeal from the United States District Court for the Northern District of Ohio from a $20,000.00 judgment as damages for malicious prosecution. The jury rendered a verdict for $30,000.00 which was reduced by the District Judge to $20,000.00.

William Sessoms will be referred to as plaintiff and The Union Savings & Trust Company as defendant.

Plaintiff was a graduate of Grinnell College in Grinnell, Iowa. He entered law school at the University of New Mexico. At the end of the term in 1958 he came from Albuquerque, New Mexico to Utica, New York. He returned to New Mexico in the school year 1958-59 but was forced to drop out for lack of funds. He was returning to Utica, New York where he had worked the summer before, but stopped at Warren, Ohio where, with the help of the Urban League, he secured work at a funeral home for a short time. Thereafter, he secured work with the Trumbull Memorial Hospital as an orderly.

He had established a bank account with a bank in Utica, New York and continued to do business with that bank when he moved to Warren. He established a relationship with the defendant's bank by cashing several of his own checks which he had drawn on the Utica bank. In establishing his connection at defendant's bank, he had been advised by Parker, the head teller, to deal with one teller to whom he had been introduced and who would be acquainted with him. This he had done and the teller was

Waldman. He had received information from the Utica bank that he was overdrawn $8.00 on a $10.00 check, and after work, at about 4:00 p.m., on June 3, 1960, he went to the defendant's bank to make arrangements to cover the $8.00 deficit on that check. When he entered the bank he saw there were several people in line at Mr. Waldman's window and he decided he might as well endorse and cash his payroll check which he had received that day. So before entering the line he endorsed the check and when he reached Waldman he had two items to take up with him, to-wit, the $8.00 coverage and the cashing of the $91.93 payroll check from Trumbull Hospital. He passed his payroll check to Waldman with the request that Waldman cash it and retain $8.00 to cover the deficit in the Utica bank. Waldman then left the window temporarily and talked with Parker as to how to handle the $8.00 transaction. He returned shortly and then excused himself again for about ten minutes. Plaintiff became impatient and, as he testified, decided to pay the $8.00 out of other funds and asked the return of his check.

Just what happened in connection with the $91.93 check is in controversy. Waldman claimed that when the check was presented he placed it in his machine and stamped it. The paper tapes in the machine corroborate Waldman's statement that the following notation: "91.93-19" was made. The 91.93 was the face amount of the check, the 19 was Waldman's teller number and the minus mark between the two sets of figures indicated that the check had been cashed. Had it been deposited, a plus mark would have appeared. There was some confusion when Waldman returned to the cage after talking to Parker. The plaintiff testified that the check was returned to him by Waldman without cashing it and that he paid $8.00 out of his pocket to cover the Utica check. Waldman was not

sure what happened to the check. He testified he might have returned it to plaintiff but he was positive, and stated many times in his testimony, that he cashed the check and paid the amount over to plaintiff. Whatever may have occurred at the bank on that day, the evidence is clear that plaintiff got the check back into his possession and either on the same afternoon, which was Friday, or early in the next week, cashed the check at the Carlisle-Allen Department Store.

Later in the day on Friday, a clerk from the proofing department of the defendant bank called Waldman and stated that he was minus a check. The amount of discrepancy in his account for the day was $91.94 and he testified that he seemed to recall that the amount of plaintiff's check was in the neighborhood of that amount. The check cleared through the bank in the middle of the following week and Waldman, who had spent much time hunting for the check, finally found it. The reverse side of the check showed that it had been endorsed by plaintiff and had been deposited in the defendant bank by the Carlisle-Allen store. Waldman testified that on the face of the check appeared the notation referred to above, namely, 91.93-19, indicating that he had cashed it and that somehow it had gotten into the hands of plaintiff and that the latter had cashed it a second time. Plaintiff on the other hand denied that the check had been cashed at the bank and denied that the notation 91.93-19 appeared on the check when it was returned to him.

An investigation was made by several officials of the bank. It was discovered that plaintiff had previously cashed a small check on another bank for which there were no funds. The supposed $8.00 deficit on June 3, 1960 was a second instance of difficulties in plaintiff's accounts.

An official of the bank talked to plaintiff and he denied

that he had cashed the check at the bank and stated that he had cashed it early the following week at the store.

The testimony of Mrs. Biggers, who cashed the check for him, was not conclusive, whether the 91.93-19 notation appeared on the face of the check at the time that she had cashed it. The possibility that plaintiff had reached under the window at the bank and had taken the check off the counter during Waldman's absence from his cage was considered by the bank. One official testified that there was room enough between the bottom of the window and the counter to reach in about 12 to 14 inches and had the check been lying on the counter, the space between was sufficient to raise the inference that plaintiff might have been able to reach the check after it had been cashed; although, as we have indicated, plaintiff denies that it was ever cashed and says that Waldman returned it voluntarily to him after the latter's return to the cage.

After some further investigation, Waldman, at the suggestion of the president of the bank, signed an affidavit which was made the basis of the indictment against plaintiff for grand larceny in the state court. Plaintiff was jailed and was held in jail some three weeks before he secured his freedom by making bond. The state proceeding was prosecuted and the jury returned a verdict of not guilty in plaintiff's favor.

Subsequently, the present suit for malicious prosecution was brought against the bank for $250,000.00 damages. A trial of several days duration ensued and the jury found for the plaintiff and assessed damages of $30,000.00. This verdict was subsequently reduced by the District Court to $20,000.00. The bank appealed.

In a suit for malicious prosecution, it is generally held, and it seems to be the law in Ohio, that the plaintiff to

recover must prove malice and lack of probable cause in the bringing of the criminal suit.

The Court has painstakingly examined not only the printed appendix but the full typewritten record made in the District Court, together with all of the exhibits. The testimony and evidence are so contradictory that the Court is not clear whether there was probable cause on the part of the bank to institute the prosecution against the plaintiff. However, after the hearing and before the charge by the District Judge, the bank made the following special request to the Court:

> "Ladies and gentlemen of the jury: the Plaintiff in bringing this action against the Defendant has injected into this case his innocence. If it can be shown that the Plaintiff in an action for malicious prosecution was in fact guilty of the offense charged, although he has been acquitted in the criminal case, it cannot be claimed by the Plaintiff that there was not probable cause for the prosecution. The Plaintiff must fail in this action whether the Defendant acted from malicious motive or not or whether the Defendant knew at the time of the institution of the criminal proceedings against the Plaintiff all of the facts establishing the Plaintiff's guilt."

The District Judge declined to give said charge, to which ruling defendant then and there duly excepted. This requested charge would have placed in issue the question whether the plaintiff was, in the action for malicious prosecution, "in fact guilty of the offense charged." It also raised the question of defendant's guilt or innocence of the charge in the criminal case. The District Judge not only declined to give the requested charge, but later in his oral charge stated the following:

> "In considering the question of probable cause, to which I have directed your attention, you should not

concern yourself with, or consider, whether the Plaintiff was, at the time the complaint was made against him by the Defendant's officer, or as a result of the trial, guilty or innocent. That is not an issue in this case. The single question, aside from the matter of maliciousness, for you to consider is whether the Defendant's officer Waldman had, at the time of causing the arrest and prosecution of the Plaintiff, reasonable and probable cause for doing so, and this would depend upon Waldman's personal knowledge or information communicated to him of facts and circumstances at the time sufficient to excite in the mind of a reasonably cautious and prudent person a reasonable belief that the Plaintiff had stolen the check in question.

* * * * *

"It is not required that a man shall prove that another was guilty of an offense before he can be said to have had probable cause for procuring his arrest. It is known and recognized that the processes of the court, the evidence adduced by the witnesses and processes of law, may or may not convict a man; so that the inquiry here is not as to whether the Plaintiff was convicted or acquitted in the Common Pleas Court, but the question is as to whether or not Waldman, in causing his arrest, had reasonable grounds to do so."

After the completion of the charge, the Court submitted to the jury special interrogatories which were apparently prepared by the defendant and given to the Court with the request that they be submitted to the jury. Interrogatory No. 3 reads as follows:

"INTERROGATORY No. 3:

Did the Plaintiff cash his payroll check from the Trumbull Memorial Hospital dated June 3, 1960 in the amount of Ninety One and 93/100 Dollars

($91.93) once at the Defendant Bank and a second time at the Carlisle-Allen Department Store?

ANSWER: "

When the jury returned its verdict, the word "No" was written on the Interrogatory following the word "ANSWER."

The defendant, among other things, asserts that it was error to charge that Sessom's guilt or innocence was not an issue in the case and took exception to the refusal of the Court to give the requested charge which we have quoted above and to its emphasis, in another part of its charge, that plaintiff's guilt or innocence was "not an issue in this case."

It is arguable that the charge of the District Judge on this question was, if an error, corrected by Interrogatory No. 3, which clearly left to the jury the question whether plaintiff not only cashed the check once at defendant's bank but cashed it a second time at the Carlisle-Allen Department Store.

We have, therefore, the legal questions, (1) whether the guilt or innocence of a plaintff in a suit for malicious prosecution is placed in issue in that case and (2) whether, if it is in issue, the failure of the judge so to charge was corrected by Interrogatory No. 3, which in general terms would place before the jury the question of guilt or innocence.

In *McFarland v. Shirkey*, 151 N. E. 2d 797, 803, the Court of Appeals of Ohio said:

> "It is, of course, well settled that in such a case as this the defendant has a right to put in issue the question of the guilt or innocence of the plaintiff. The plaintiff in such case was obligated to prove more than the mere filing of the charge and subsequent dismissal. * * *"

Coleman v. Reed Brothers & Co., 18 Ohio App. 316. See also, *Kintner v. Cheeks*, 71 Ohio App. 333, 49 N. E. 2d 962; *John Bright Shoe Stores Co. v. Scully*, 24 Ohio App. 15, 156 N. E. 155.

In the *Restatement of the Law of Torts*, Sec. 657, under the general head of Wrongful Prosecution of Criminal Proceedings (Malicious Prosecution), it is said:

"§ 657. PLAINTIFF'S GUILT AS BAR TO RECOVERY.

The fact that the person against whom criminal proceedings are instituted is guilty of the crime charged against him, is a complete defense against liability for initiating or pressing such proceedings.

Comment:

a. Retrial of issue of guilt. Under the rule stated in this Section the guilt or innocence of the person accused in criminal proceedings may be retried despite the termination of those proceedings in his favor. Thi is so even though the accused was acquitted after trial by a verdict of not guilty * * *."

In 34 *Am. Jur.*—Malicious Prosecution—Sec. 147, it is said:

"*Actual Guilt or Liability of Plaintiff.*—It has frequently been held that the plaintiff in an action for malicious prosecution must, notwithstanding his acquittal in the original prosecution, always be regarded as tendering the issue of his innocence or freedom from liability, and must fail in his action if that innocence or nonliability can be disproved, whether the prosecutor acted from malicious motives or not, and whether or not he knew of the facts establishing the plaintiff's guilt or liability. Competent evidence tending to prove the actual guilt or liability of the plaintiff is, therefore, generally held to be admissible in favor of the defendant. * * *"

In *Prosser Handbook of the Law of Torts*, Third Edition, Section 113, pp. 858, 859, it is said:

> "A further limitation upon the action of malicious prosecution is that it is always open to the defendant to show that the plaintiff was in fact guilty of the offense with which he was charged. This defense, which is closely analogous to that of truth in actions for defamation, is supported by a similar policy in favor of encouraging exposure of the guilty. It does not depend upon the prosecutor's reasonable belief that the accused was in fact guilty, and it is available even though the criminal proceeding was begun with no such belief at all. As in defamation, the burden of proof of the issue is upon the defendant, and the guilt proved must be substantially equivalent to the charge made. The defense is available notwithstanding an acquittal in the criminal proceeding, and the question of guilt may be retried in the malicious prosecution action. The reason for this is that a verdict of not guilty does not necessarily establish innocence, but merely a failure of the prosecution to prove guilt beyond a reasonable doubt; and in the subsequent civil action, where all that is required is a preponderance of the evidence on the issue, a further inquiry may be made before a new jury as to whether the lesser burden of proof can be sustained. Thus, while an unreversed conviction is conclusive as to guilt and bars malicious prosecution, an acquittal is not conclusive as to the plaintiff's innocence."

In the opinion of this Court, a plaintiff in a suit for malicious prosecution does place in issue the question of his guilt or innocence even though he was acquitted by the jury in the criminal prosecution. In Ohio, as we have noted, it is well settled "that in such a case * * * the defendant has a right to put in issue the question of the guilt or innocence of the plaintiff," and it did seek to place this question in issue by the requested charge which was re-

fused by the District Judge. The rationale of this rule of law, as indicated in Prosser, seems to rest upon the differences in the degree of evidence required to prove guilt in the criminal case and in the civil case. In the criminal case, the prosecution is, of course, required to prove guilt beyond a reasonable doubt, and in the civil case guilt is proved simply by a preponderance of the evidence.

The District Judge stated categorically in the body of his charge:

> "* * * you should not concern yourself with, or consider, whether the Plaintiff was, at the time the complaint was made against him by the Defendant's officer, or as a result of the trial, guilty or innocent. That is not an issue in this case."

As we have indicated, it *was* properly an issue in the case and there is before us a second question, whether the language of Interrogatory No. 3 corrected this erroneous charge.

In 53 *Am. Jur.*—Trial—Section 837, p. 614, the commentator said:

> "* * * as a rule, a misdirection is not cured by a subsequent statement of a correct principle, unless the judge calls the jury's attention to the incorrect statement and retracts or modifies it, or unless the context shows that one charge is in fact a correction or modification of the other."

A similar statement is found in 89 *C. J. S.*—Trial—Section 441:

> "Generally an erroneous instruction is not cured by the mere giving of correct instructions necessarily inconsistent therewith, although if the instruction is defective merely, in that it is inaccurate, misleading, confusing, or incomplete, it may be cured by another instruction.

"A correct instruction will cure the error in another only where the instructions, as a series, state the law correctly, and it is evident that no harm has been done by the erroneous instruction. Otherwise, in order to obviate the effect thereof, the erroneous instruction must be expressly withdrawn from the jury or the erroneous instruction must be corrected by a qualification referring directly to it and *a mere incidental reference to the issue in another instruction, or an implied qualification of the instruction by a later instruction, or words carrying an inference rather than a direct statement of the correct rule,* or a statement that it is the duty of the jury to recall the evidence, *is insufficient.*" (Emphasis added.)

In *First National Bank of Huntsville v. Lucy Stewart,* 204 Ala. 199, 13 A.L.R. 302, a depositor sued a bank for the dishonor of his check. The lower court charged as follows:

"If you are reasonably satisfied from the evidence in this case that the conduct of the teller of the defendant bank was characterized by a reckless indifference as to the probable consequence of his act in telling the payee of plaintiff's check that she had no funds with the defendant bank, then he would be guilty of wantonness, and plaintiff would be entitled to recover punitive damages of the defendant bank, if you are reasonably satisfied from the evidence that she was damaged as a result of such wanton conduct on the part of the teller."

The appellate court held that this charge was error and the question arose whether the effect of the error was obviated by the Court's oral charge, in which the jury was told that in the event of a finding that the bank acted in reckless disregard of plaintiff's rights, it might assess damages for the purposes of punishment. The Court held:

"The error of the charge cannot be relieved. * * * The oral charge could have corrected the error of the special charge in question only by some manner of statement or other treatment tantamount to an instruction that the jury were not to accept the charge as a correct statement of the law. The record shows no recognition nor correction of the error of the charge."

In 5A C. J. S.—Appeal & Error—Section 1763(1)b., it is said:

"b. Prejudicial Error

"The judgment will be reversed where the case has been submitted on erroneous instructions which operate to the prejudice of the complaining party.

"When the case has been submitted on erroneous instructions which operate to the prejudice of the complaining party, the judgment will be reversed, as where the instruction was misleading. Likewise, the judgment will be reversed where the instruction was confusing, or material and harmful, or where the verdict was in direct response to the particular charge." (Emphasis added.)

The commentator pointed out that a judgment will be reversed for prejudicial error in the giving of instructions in, among others, a case for malicious prosecution.

It can hardly be said in this case that the instruction which was refused should not have been given and likewise it cannot be said that the instruction in the oral charge that plaintiff's guilt or innocence was not in issue could not have prejudiced the plaintiff [*sic*]. The jury's verdict allowed $30,000.00 in damages to plaintiff which was reduced by a remittitur to $20,000.00. Although the Interrogatory No. 3 did instruct the jury to find whether plaintiff had cashed the check twice and the jury made a

finding that he did not, the language of the Interrogatory was couched in quite different terminology from the oral instruction that the guilt or innocence of the plaintiff was not in issue. In addition, the Interrogatory constituted a side reference, rather than an explicit one, to the question. The authorities which we have examined indicate that where there is an erroneous instruction, it should be corrected by a positive statement of the Court that the instruction in question was erroneous and is specifically corrected by the later instruction. We cannot say that this was done by the language of Interrogatory No. 3.

In our opinion, the defendant could not help but be prejudiced not only by the refusal of the Court to give the requested instruction but also by its positive charge to the contrary.

Although the plaintiff [*sic*] did not except to the erroneous portion of the Court's charge, it did save its exception to his failure to give what we deem to be the correct charge on the subject of plaintiff's guilt or innocence. In our opinion, the failure to except to the erroneous charge under all the circumstances did not constitute a waiver by the defendant of the error in the Court's oral charge on this subject, and the situation is distinguishable from that appearing in *Transamerican Freight Lines, Inc. v. Universal Die Casting Co.*, 192 F. 2d 931 (C. A. 6).

The case must be reversed and remanded for retrial.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered November 27, 1964.)

BEFORE: CECIL and PHILLIPS, Circuit Judges, and TAYLOR, District Judge.

Appeal from the United States District Court for the Northern District of Ohio.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and remanded for retrial.

It is further ordered that defendant-appellant recover from plaintiff-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON PETITION FOR REHEARING.

(Decided February 27, 1965.)

Before: CECIL and PHILLIPS, Circuit Judges, and TAYLOR, District Judge.

PER CURIAM. Plaintiff-appellee requests the Court to reconsider its decision reversing and remanding the case for retrial.

It is asserted that the jury verdict should be reinstated and the judgment below affirmed if the real meaning of Rule 49(b) of the Federal Rules of Civil Procedure is observed.[1]

Plaintiff points out that the jury found that he did not steal the check from the bank when it answered Interrogatory No. 3 and insists that this finding made harmless the erroneous charge.

Ordinarily harm is presumed if an erroneous charge is made on a material issue. The parties agree that the guilt or innocence of plaintiff was unquestionably a material issue in the case. The District Judge put the case to the jury only on the issues of malice and probable cause. It is noted that the charge contains this language on the issue of probable cause:

> "* * * The single question, aside from the matter of maliciousness, for you to consider is whether the Defendant's officer Waldman had, at the time of causing the arrest and prosecution of the Plaintiff, reason-

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[1] "(b) *General Verdict Accompanied by Answer to Interrogatories.* The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

able and probable cause for doing so, and this would depend upon Waldman's personal knowledge or information communicated to him of facts and circumstances at the time sufficient to excite in the mind of a reasonably cautious and prudent person a reasonable belief that the Plaintiff had stolen the check in question."

It would not necessarily follow that lack of probable cause to Waldman meant lack of probable cause to the defendant bank because Waldman was only a minor employee of the bank. The question was whether the bank had probable cause to believe plaintiff stole the check. If the bank had probable cause to believe plaintiff guilty even though Waldman did not, there could be no liability against the bank. The defendant did not except to the above quoted portion of the charge and ordinarily a new trial would not be granted for such failure, unless other error appears in the record.

The issue of probable cause was close. The District Judge instructed the jury not to consider the question of guilt of the defendant [*sic*]. But at the conclusion of the charge he told them that he was submitting to them three interrogatories, each of which would require a written answer. Interrogatory No. 3 required the jury to pass on the guilt or innocence of plaintiff. It is obvious that Interrogatory No. 3 was inconsistent with those portions of the charge that instructed the jury that plaintiff's guilt was not an issue. This inconsistency was confusing and misleading to the jury, and in the opinion of this Court was prejudicial to the defendant.

This Court, in the case of *Standard Life & Accident Insurance Co. v. Sale* (1903), 121 Fed. 664, at page 669, stated:

"These instructions stated the law correctly. But the mere giving them without recalling or explaining the instructions given on the court's own motion would not be likely to remove the impression already made. In order to render an error harmless, it must be made to appear clearly that the party complaining of it was not prejudiced.

"The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and, secondly, it is impossible after verdict to ascertain which instruction the jury followed. (Citing cases) * * *." (Emphasis supplied.)

We have carefully examined the cases cited by plaintiff's counsel that applied the rule that if special findings of the jury show that a party was not injured by an erroneous charge or an erroneous denial of a special charge, the error is harmless. The rule is sound, but in the opinion of this Court, it is not applicable to the facts of this case.

The Clerk is authorized to enter an order denying the petition for rehearing.

ORDER DENYING PETITION FOR REHEARING.

(Entered February 27, 1965.)

BEFORE: CECIL and PHILLIPS, Circuit Judges, and TAYLOR, District Judge.

In accordance with the opinion this day filed, the petition for rehearing is hereby denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.